Filed 1/23/19 P. v. Haynes CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. STEVEN PAUL HAYNES, Defendant and Appellant.	D074060 (Super. Ct. No. RIF1310582)

APPEAL from a judgment of the Superior Court of Riverside County, Edward D. Webster and Mac R. Fisher, Judges. Affirmed and remanded for resentencing.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

Steven Paul Haynes shot and killed his brother, Michael, in the front yard of their home. Haynes admitted killing Michael, but claimed it was heat-of-passion voluntary

manslaughter, not murder. Rejecting that contention, a jury convicted him of first degree murder and found true a gun enhancement allegation. (Pen. Code,[1] §§ 187, subd. (a); 12022.53, subd. (d).)

In separate proceedings, Haynes admitted a prior serious felony conviction. After granting Haynes's *Romero*[2] motion, the court sentenced Haynes to prison for five years under section 667, subdivision (a), plus an indeterminate term of 50 years to life, consisting of 25 years to life for murder, plus a consecutive 25 years to life for the gun enhancement.

On appeal, Haynes's primary contention is that no substantial evidence supports the jury's finding of first degree murder and, therefore, his conviction should be reduced to voluntary manslaughter or second degree murder.

Haynes also contends his conviction should be reversed because the prosecutor committed misconduct by (a) asking him argumentative questions about premeditation and deliberation and whether he was lying, (b) referring to Michael's death as "murder" despite being admonished to call it a "killing," (c) eliciting inadmissible evidence that Haynes's prior felony conviction prohibited him from having a gun, and (d) misstating the law in closing argument. Because Haynes's trial counsel did not object to all of these alleged errors, and to avoid forfeiture of such issues on appeal, Haynes contends his

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1 Undesignated statutory references are to the Penal Code.

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

counsel's failure to object constituted ineffective assistance of counsel. Haynes further contends that he was prejudiced by the cumulative effect of the errors.

We affirm. Substantial evidence supports the conviction for first degree murder. We agree with Haynes that the prosecutor committed misconduct by twice referring to the killing as "murder" and misstating aspects of the law regarding voluntary manslaughter. However, the scattered references to "murder" instead of "killing" were insignificant, and the prosecutor's misstatements of law were harmless. We also agree with Haynes that the court improperly admitted evidence that Haynes's prior conviction prohibited him from possessing a firearm. However, the jury was already aware that Haynes had a prior felony conviction, and the court instructed the jury it could use such evidence only to assess credibility, a permissible use of that evidence. Accordingly, that error is also harmless. We reject Haynes's remaining contentions.

While this appeal was pending, the Legislature enacted section 12022.53, subdivision (h), which now gives the trial court discretion to strike or dismiss the 25-year gun enhancement. Haynes contends, and the Attorney General concedes, that this amendment applies. We agree and, therefore, will affirm the judgment of conviction and remand for resentencing.

Additionally, before the originally scheduled date for oral argument, Haynes's appellate counsel informed us that on September 30, 2018, the Governor signed Senate Bill No. 1393, effective January 1, 2019, which amends sections 667 and 1385 to give the trial court discretion to dismiss, in the furtherance of justice, five-year prior serious felony enhancements under section 667, subdivision (a)(1). On our own motion, we

rescheduled oral argument for January 2019 and requested the parties file supplemental letter briefs on this issue. Haynes and the Attorney General agree that this law will apply to parties, like Haynes, whose appeals are not final on the law's effective date. We agree as well and remand for resentencing under this provision.

FACTUAL BACKGROUND

A. *The People's Case*

In September 2013 Haynes and Michael lived with two other roommates in Riverside County.[3] Jessica R., a neighbor, met Michael around September 5, and they had sex about a week later. Afterwards, they decided to be "just friends."

On September 15, Michael invited Jessica to his 28th birthday party at his house. Haynes and another roommate, Rick R., along with several other people also attended. People were drinking alcohol, smoking marijuana, and having a good time at the party. By around 7:30 p.m., Michael had his arm around Jessica.[4]

Jessica and Haynes met for the first time at the party. Haynes knew that Michael and Jessica had been intimate a few days earlier. After the guests had left, Jessica and Haynes were outside, passionately kissing. Michael saw them and was jealous, upset, and "all worked up." Haynes said, "I love you, Bro." Michael replied, "You don't love me."

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3 Unspecified dates are in 2013.

4 Michael told a friend that he intended to have "birthday sex" with Jessica that night.

This was not the first time Haynes had been intimate with one of Michael's girlfriends. Previously, Haynes had a relationship with a woman who Michael had dated for years. That greatly upset Michael, especially when Haynes got the woman pregnant.

Haynes and Jessica went upstairs to his bedroom, to "get away from any kind of drama" and for privacy. A minute or two later, Michael kicked in the door to Haynes's room. After breaking down the door, Michael went back downstairs yelling, "I don't give a fuck, you're just my neighbor."

Rick was in his upstairs bedroom when he heard the commotion. He saw the broken door and asked Haynes, "You all right, Dude?" Haynes replied, "Yeah, I'm cool." Haynes and Jessica followed Michael downstairs and outside to the front yard. Haynes apologized, trying to deescalate the situation. Michael said, "You guys left me alone on my birthday." An argument ensued, which was loud enough for Rick to hear in his bedroom. Rick texted Jessica, "What's going on?" She replied that the brothers were arguing. Rick responded, "Let them be. They are brothers. They argue."

A short while later, Jessica texted Rick, "They are going at it." Michael head-butted Haynes in the face and then knocked Haynes to the ground. Jessica described the head-butt as violent, forceful, scary, and aggressive. Michael stood over Haynes, whose mouth was bleeding. Haynes did not fight back; he never laid a hand on Michael.

Haynes went inside the house; Jessica remained outside on the porch, trying to calm Michael down. Michael told her to "[g]et the fuck out of there." Jessica thought the incident was over; she did not expect anything more to happen.

Haynes ran upstairs to the bathroom, where he kept his .44-caliber Ruger revolver under the sink.[5] Michael did not follow him inside. The gun was unloaded and had a trigger lock. Haynes went to his bedroom where he kept the ammunition and loaded the gun with six rounds.[6]

On the way back outside, Haynes walked past Rick, who was in his room. Haynes's mouth was "all bloody" and he was angry, pacing back and forth. Haynes told Rick, "Go talk to your boy. Talk to your boy." Rick told Haynes to "calm down, chill"—but Haynes said, "I'm going to go shoot him." Rick replied, "Don't even talk like that." Haynes went downstairs.

It was now after midnight. About a minute had elapsed since Haynes had entered the house and got his gun. Michael was still outside, on the front lawn.

Standing in the front doorway, Haynes shot Michael twice. Michael's body twisted and landed on the ground. Haynes then went inside for a few seconds, went right back out, and with an "angry look on his face," stood over Michael and shot him four more times.

Haynes immediately fled in his car. Michael was still alive, spitting blood and gasping for air. Michael died shortly thereafter at the scene. The coroner found methamphetamine and alcohol in his blood.

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5 According to the probation report, the .44 Ruger is one of the most powerful handguns in the world, capable of killing elk-sized game.

6 Police subsequently found a holster for the .44 Ruger and three live .44-caliber rounds in Haynes's bedroom.

Haynes hid the gun in a vacant field. Police arrested him later that day. After Haynes told police where he hid the gun, police recovered the weapon.

Initially, Haynes lied to police, claiming he was not at the party and did not know Michael had been shot. Later, however, lamenting that his friends had "ratted" him out, Haynes admitted killing Michael. Haynes told police there was "no excuse" and he could not live with himself if he "got away with this."

After being arrested, Haynes told his mother that after Michael head-butted him, "[h]e was contemplating things in his head. He was thinking, what would I do if I left? I–I would just go home. And he didn't want to—he didn't want to have to deal with that anymore. He didn't want to have to deal with that again."

B. *Defense Case*

Defense witnesses testified that Michael was a violent methamphetamine addict who never lost a fight and had been beating and abusing Haynes since they were both children. Witnesses said that Haynes does not fight and is "mellow."

Stephanie B., their mother, testified that on one occasion, Michael was "on speed" and beat her husband, fracturing his skull. In another incident in July 2012, Michael kicked Haynes in the face and head. Stephanie testified that Michael was also taking steroids and was "very violent, very agitated, very edgy, [and] short tempered" on methamphetamine.

Bobbi B., a friend of Michael's, testified that Michael struck his former girlfriend in the face, punched someone in the face who owed him money, and bragged about being able to beat Haynes. Christina L., who dated Michael for about five years, testified that

he split her nose, blackened her eyes, split her lip and punched her in the forehead. She testified that Michael had a lightening punch and a short fuse. She saw Michael body-slam someone he found taking something out of his mother's mailbox. Michael was known for knocking people out. His Facebook page showed someone he knocked out with one punch and was captioned, "Talk shit, get hit."

Haynes testified in his own defense. Michael was two years older than he and had been beating Haynes up since third grade. As they got older, Michael would punch him in the face and shove him on the ground. When they were children, Michael heated a coat hanger over the stove and wrapped it around Haynes's wrist. Incidents like these made Haynes feel "helpless."

Haynes could not fight back because Michael was so strong. Within the past few years, Michael was using methamphetamine, which made him even more violent. When Michael was on methamphetamine, "he hated everybody and everything." A witness testified that while on methamphetamine Michael "starts acting like an asshole and starts treating people like shit."

Michael frequently took Haynes's possessions, and when Haynes protested, Michael "would just snap with a punch or a head-butt." Haynes testified that when Michael "snaps" he "explodes" and "gets real physical." In July 2012 Michael beat Haynes badly around the head, ripping out Haynes's earrings, damaging his earlobes, and causing Haynes's eyes to swell shut. This particularly violent beating made Haynes feel "helpless."

Haynes eventually forgave Michael for the July 2012 beating and allowed Michael to live with him because Michael needed a place to stay. But the violence continued. About a week or two prior to the shooting, the brothers argued about Michael's misuse of Haynes's tools. Michael hit a bowl of noodles out of Haynes's hands and slammed his bedroom door shut.

On the night of the party, Haynes testified he was "really drunk," his vision was blurry, and his "head was foggy." When Michael bashed his bedroom door, Haynes was "[s]cared" because he knew Michael's capacity for violence. When Michael went downstairs, Haynes and Jessica followed, trying to calm him down. Michael was "pretty pissed" that Haynes and Jessica had been kissing and was "yelling, screaming, getting in [Haynes's] face." Michael body-checked Haynes "a couple times," pushing him back—and then head-butted Haynes in his mouth. This split open Haynes's lip and pushed his teeth in. Haynes fell down, with blood running down his face. He felt "[s]cared" and "frightful." Haynes got up, and Michael head-butted him again in the face, two or three times.

Haynes testified he was "really scared" and "black[ed] out" and did not know what he was doing after that. He testified that he was "not in [his] right mind" and was "overwhelmed" by the situation. He added, "I was just scared. I was really—really scared. And I was shooken [*sic*] up. I was really emotional. All my—all the emotions from the whole incident from my past, it all just came crashing down on me."

Haynes did not recall getting the gun or fleeing in his car afterwards. Haynes testified that he "passed out" in his car and awoke "freaking out," knowing that "something terrible happened."

Haynes testified, "I wasn't in my right mind when it all happened" because he was "drinking a lot of alcohol that day and that night" and was "just scared."

Haynes denied that he stopped by Rick's room and denied telling Rick he intended to shoot Michael. He also denied that he killed Michael out of anger or because he was "upset"—rather, he "felt helpless" and "scared . . . emotional from how he's treated me."

DISCUSSION

I. *SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S FIRST DEGREE MURDER FINDING*

Haynes challenges his first degree murder conviction on the grounds that "there was insufficient evidence from which a reasonable juror could have found, beyond a reasonable doubt, that he premeditated and deliberated . . . ." He contends this requires his conviction be reduced to voluntary manslaughter or second degree murder.

A. *The Standard of Review*

Our role in reviewing a sufficiency of the evidence claim is limited. (*People v. Smith* (2005) 37 Cal.4th 733, 738.) We examine the entire record in the light most favorable to the judgment and determine whether the evidence is of such solid value that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses.

(*People v. Little* (2004) 115 Cal.App.4th 766, 771.) The testimony of a single witness, if believed by the jury, is sufficient to support a conviction, unless that testimony is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) " '[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Hatch* (2000) 22 Cal.4th 260, 272, italics omitted.)

B. *Distinctions Between Murder and Voluntary Manslaughter*

1. *Introduction*

California law separates criminal homicide into two classes, "the greater offense of murder and the lesser included offense of manslaughter." (*People v. Rios* (2000) 23 Cal.4th 450, 460 (*Rios*).) "The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice." (*Ibid.*)

A defendant "who intentionally and unlawfully kills . . . lacks . . . malice when [he] acts in a 'sudden quarrel or heat of passion . . . ." (*Rios, supra*, 23 Cal.4th at p. 460.) Sufficient provocation negates the element of malice or causes it to be disregarded as a matter of law. (*People v. Bryant* (2013) 56 Cal.4th 959, 968 (*Bryant*).)

2. *What constitutes heat of passion*

A killing is upon a sudden quarrel or heat of passion if the killer acts "not out of rational thought but out of unconsidered reaction to the provocation." (*People v. Beltran* (2013) 56 Cal.4th 935, 942 (*Beltran*).) There is both an objective and a subjective component to the heat of passion requirement: (1) subjectively, the defendant must

actually kill under the heat of passion and (2) objectively, the provocation must be such as would naturally arouse such passion in an ordinary reasonable person. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583 (*Manriquez*).) "'The provocative conduct . . . may comprise a single incident or numerous incidents over a period of time.'" (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1481 (*Wright*).) The passion aroused can be anger, rage, or any violent, intense, highly wrought or enthusiastic emotion—except revenge. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) "[T]he provocation must be one that would cause an emotion so intense that an ordinary person would simply react, without reflection." (*Beltran, supra*, 56 Cal.4th at p. 949, italics omitted.) "[T]he anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene. Framed another way, provocation is not evaluated by whether the average person would act in a certain way: to kill. Instead, the question is whether the average person would react in a certain way: with his reason and judgment obscured." (*Ibid*., italics omitted.) In such cases, the law, "'out of forbearance for the weakness of human nature'" (*Bryant, supra*, 56 Cal.4th at p. 969), reduces the offense to manslaughter. (*Ibid*.)

The objective element of heat-of-passion manslaughter precludes consideration of voluntary intoxication. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1226 (*Rangel*) ["[T]he test whether provocation is adequate is whether 'an average, sober person would be so inflamed that he or she would lose reason and judgment.'"].) Evidence of voluntary intoxication cannot, therefore, be used to negate malice by showing defendant was acting in the heat of passion. (Cf. *People v. Soto* (2018) 4 Cal.5th 968, 970 (*Soto*) [jury may not

consider voluntary intoxication on the question of whether the defendant believed he needed to act in self-defense].)

3. *Cooling off*

If sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not manslaughter. (*Rangel, supra*, 62 Cal.4th at p. 1225.) Similarly, if in fact the defendant's passion did cool, "'which may be shown by circumstances such as the transaction of other business in the meantime, rational conversations upon other subjects, evidence of preparation for the killing, etc., then the length of time intervening is immaterial'" and heat of passion is inapplicable. (*People v. Golsh* (1923) 63 Cal.App. 609, 617.)

4. *Fundamentally, a question of fact*

"[W]hether adequate provocation and heat of passion have been shown are fundamentally jury questions, because jurors, by virtue of their random selection and varied backgrounds and occupations, are much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature . . . ."'" (*Wright, supra*, 242 Cal.App.4th at p. 1482.)

C. *Substantial Evidence Supported the Jury's Finding that Haynes Did Not Act in Heat of Passion*

Substantial evidence supports the jury's finding that Haynes did not kill in a sudden quarrel and heat of passion. First and foremost, Haynes told his mother that after the head-butt, he was "contemplating things in his head" and "thinking" what to do. He

told his mother that he "didn't want to have to deal" with that situation again. "Contemplating" and "thinking" involves reflection and exercising judgment. These mental states are the antithesis of acting in the heat of passion. (See *Beltran*, *supra*, 56 Cal.4th at p. 942.)

Moreover, at trial Haynes testified that he "wasn't in [his] right mind when it all happened" *because* he was "drinking a lot of alcohol that day and that night" and was scared. Haynes testified he was "really drunk," his vision was "blurry," his head was "foggy," and he drank "more than enough to be drunk." Haynes testified that he was not "processing" how Michael would interpret his intimacy with Jessica because he was drunk. This undermines Haynes's voluntary manslaughter theory because the objective test for whether provocation is adequate is whether an "'average *sober* person would be so inflamed that he or she would lose reason and judgment.'" (*Rangel*, *supra*, 62 Cal.4th at p. 1226, italics added.) Voluntary intoxication is not "an excuse for poor judgment when someone kills." (*Soto*, *supra*, 4 Cal.5th at p. 978.)

Citing *People v. Elmore* (1914) 167 Cal. 205 (*Elmore*), Haynes contends that Michael's body-checks and head-butts compelled the jury to find legally adequate provocation.[7] However, *Elmore* is factually off-point. In that killing, which occurred in a bar fight, the defendant killed an intoxicated man who had attacked him. (*Id.* at pp. 207-209.) This case is distinguishable because Haynes did not kill Michael in the midst of the fight. Rather, after Michael attacked, Haynes went inside the house, got his gun,

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7 *Elmore* was disapproved on other grounds, as stated in *People v. Camargo* (1955) 130 Cal.App.2d 543, 549-550.

loaded it, conversed with Rick, threatened to kill Michael, and then went back outside and shot Michael twice. Haynes went back inside the house for a few seconds and then went back outside and shot Michael four more times.

Thus, assuming without deciding that *Elmore* stands for the proposition that a severe physical attack may constitute adequate provocation—here, the jury reasonably could have found that when Haynes went inside after the fight, the passions of a reasonable person would have had time to cool, and/or Haynes's passions actually did cool. Jessica testified that about a minute elapsed between the time Haynes entered the house and the gunshots. It was a question of fact for the jury whether that was sufficient time for passions to cool. "No definite time was necessary after defendant was struck for his angry passions to cool." (*People v. Fosetti* (1908) 7 Cal.App. 629, 631 (*Fosetti*).) The fight had ended, the parties had separated, Haynes had no grounds to fear further danger—and when he returned, and without any new provocation, he killed Michael. The jury could reasonably infer that when Haynes went inside to get his gun, he did so with the deliberate intention of killing Michael. (*Id.* at pp. 631-632 [after fight, defendant leaves and within one minute returns with a gun and kills—Held: "[I]t is for the jury to say whether the killing was the result of malice and premeditation, or whether it occurred during a sudden quarrel or heat of passion."].)

Haynes cites some of this same evidence in asserting that his conviction should be reduced to voluntary manslaughter. He notes that Michael was aggressive, violent, and forceful, getting in Haynes's face and standing over him after the fight. Haynes asserts that Michael's violent tendencies and past violence towards him were "an essential

component" of heat of passion. Michael taunted Haynes, kicked in Haynes's bedroom door, and violently assaulted Haynes before Haynes went inside to get his gun.

At its core, Haynes's argument is that the jury was *required* to find that he killed Michael in heat of passion. Certainly, the jury was entitled to consider the inferences Haynes urges on appeal. However, Haynes's argument fails because we are required to view the evidence in a light most favorable to the judgment. """If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.""" (*People v. Cravens* (2012) 53 Cal.4th 500, 508.) Reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Olea* (1971) 15 Cal.App.3d 508, 513.)

D. *Substantial Evidence of Premeditation and Deliberation*

Second degree murder is an unlawful killing with malice, but without premeditation and deliberation. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) If the provocation that leads to an unlawful homicide would not cause an average person to act in the heat of passion, but does subjectively preclude the defendant from premeditating or deliberating, the crime is second degree murder. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.) Haynes contends his conviction should be reduced to second degree murder because there is insufficient evidence that the shooting was deliberate and premeditated.

First degree murder requires a "willful, deliberate, and premeditated" killing. (§ 189.) "'In this context, "premeditated" means "considered beforehand," and

"deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."'" (*People v. Jurado* (2006) 38 Cal.4th 72, 118.) There must be sufficient evidence that the defendant carefully weighed considerations in choosing a course of action and thought about his conduct in advance. (*People v. Cage* (2015) 62 Cal.4th 256, 276 (*Cage*).) '"'"The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."'" (*Ibid*.)

People v. Anderson (1968) 70 Cal.2d 15 identifies three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. (*Id.* at pp. 26-27.) However, these factors are not exclusive and are only a guide in assessing whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. (*Cage, supra*, 62 Cal.4th at p. 276.) Evidence of all three *Anderson* elements is not necessary to sustain a conviction. (*People v. Edwards* (1991) 54 Cal.3d 787, 813-814 [no evidence of motive].)

Contrary to Haynes's contention, the jury could reasonably find beyond a reasonable doubt that the shooting was a result of premeditation and deliberation. After being head-butted, Haynes went into the house, retrieved his gun from the bathroom, removed the trigger lock, loaded the gun, paced back and forth, told Rick that he intended to shoot Michael, and then went outside where he shot Michael with two rounds. Based on this evidence, the jury could reasonably find that Haynes acted with premeditation and

deliberation. (See *People v. Wharton* (1991) 53 Cal.3d 522, 547 [retrieving weapon after arguing with the victim is evidence of planning]; *Manriquez, supra*, 37 Cal.4th at p. 578 [leaving and returning with a gun supports a finding of premeditation and deliberation]; *People v. Sanchez* (1995) 12 Cal.4th 1, 34 [leaving argument to obtain knife is evidence of planning], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The jury could reasonably conclude that Haynes had sufficient time to reflect during the time it took him to go inside the house, retrieve the gun, remove the trigger lock, load it, and go back outside. (*People v. Brady* (2010) 50 Cal.4th 547, 563 ["premeditation and deliberation can occur in a brief period of time [and] lack of evidence of extensive planning does not negate a finding of premeditation"]; *Fosetti, supra*, 7 Cal.App. at p. 631 [under one minute, jury question].)

The manner of killing also supports the jury's finding of premeditation and deliberation in this case. Haynes shot Michael six times—twice in the back and at least once while Michael was on the ground.

There is also sufficient evidence of motive. The jury could reasonably infer that Haynes killed Michael out of revenge. Indeed, Haynes essentially admitted as much, stating that after the head butt, he was "contemplating things" and decided to kill because he "didn't want to have to deal with that anymore." (See *People v. Cruz* (1980) 26 Cal.3d 233, 245 ["Defendant's pent-up resentment toward his victims establishes the prior relationship from which the jury reasonably could infer a motive for the killings."].)

Haynes's behavior after the killing is also relevant to show premeditation and deliberation. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1128.) Haynes fled and buried

the gun in a field. When interviewed by police, he denied even being at the party. This conduct is inconsistent with a state of mind that would have produced a rash, impulsive killing and is instead consistent with a premeditated and deliberate killing. (See *People v. Moon* (2005) 37 Cal.4th 1, 27-28 [evidence of flight demonstrates premeditation and deliberation].)

Haynes's argument to the contrary relies on an alternate interpretation of the evidence. He claims that deciding to retrieve and use the gun does not establish careful weighing of the consequences of his actions. He asserts that unlike some other first degree murder cases, he did not lure the victim to an isolated location, nor did he come to the party with a loaded weapon. He spent the day planning his brother's party, not his murder. He argues that he fled afterwards because he was horrified and distraught. Further, Haynes contends the violent confrontation before the shooting shows he acted because of emotional impulse, not a preconceived design. In sum, he contends the killing is the result of an emotional outburst or random "explosion" of violence—not a calculated murder.

These are reasonable points to argue to a jury; however, Haynes's appellate argument fails because of the standard of review. The jury drew contrary inferences and conclusions. We must accept the logical inferences the jury drew from the circumstantial evidence, even if we would have concluded otherwise. (*People v. Carter* (2005) 36 Cal.4th 1215, 1258.) """If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be

reconciled with a contrary finding does not warrant a reversal of the judgment.""" (*People v. Watkins* (2012) 55 Cal.4th 999, 102, italics omitted.)

II. *PROSECUTORIAL MISCONDUCT ISSUES*

A. *Additional Factual Background—Premeditation and Deliberation*

During cross-examination, the prosecutor questioned Haynes regarding premeditation and deliberation, in part as follows:

> "Q: [When you entered the house after the head-butt], you could have went [*sic*] out to the back door and hopped the fence. Correct?
>
> "A: I wasn't thinking about any of that.
>
> "Q: [Be]cause the only thing you were thinking about at that time was shooting your brother. Isn't that right?
>
> "A: I wasn't thinking of that either. I was just overwhelmed.
>
> "Q: The only thing you were thinking about was killing your brother. Isn't that right?
>
> "A: I wasn't thinking about killing my brother."
>
> "Q: So you go into your house, and at that point you make a conscious decision not to leave your house, but to shoot your brother. Correct?
>
> "A: I wasn't deciding that."
>
> "Q: So you go up the stairs. Correct?
>
> "A: Yes.
>
> "Q: And you're telling yourself, I'm going to shoot my brother. Correct?
>
> "A: No, I'm not telling myself that."

"Q: So when you grabbed that weapon, you know it's a—a deadly piece of machinery. Correct?

"A: Anybody does, yes.

"Q: And so you know when you pick up that weapon you're going to kill your brother. True?

"A: That's not what was going on in my head.

"Q: Well, you don't normally walk around with guns, do you?

"A: No, I don't.

"Q: So you went and got that gun for a reason, didn't you?

"A: I don't know.

"Q: And that reason was to shoot and kill your brother.

"A: I had no decision. I wasn't making decisions like that."

"Q: And then you went back into the plastic shelf and you grabbed the second bullet and placed it into the revolver. True?

"A: That's not true.

"Q: And the reason you did that is because you were going to shoot and kill your brother. True?

"A: That's not true."

"Q: . . . After you tell Rick[], 'You better go check on your boy. I'm about to shoot him,' Rick[] tells you, 'Don't do that. Chill out. Let me go downstairs.' Correct?

"A: I—I didn't hear that. I didn't even see Rick[].

"Q: Okay. And then you take a second or two and you pace back and forth, and you confirm in your mind that you're going to shoot and kill your brother. Isn't that right?

"A: No.

"Q: So you walk to the end of the hallway to the top of the staircase. Is that true?

"A: I ran to the bathroom.

"Q: After you got the weapon, you went to the end of the hallway to the top of the staircase. Correct?

"A: I just ran out. I ran back out.

"Q: Well, you had to go to the top of the staircase to run out. True?

"A: I ran right back down out the front door.

"Q: My point is, when you grab the weapon, you had to have gone to the top of the staircase and down the stairs before you ran out. Correct?

"A: I suppose.

"Q: Okay. And during that time you're telling yourself, I'm going to kill my brother [be]cause I'm pissed off about him splitting my—my lip. True?

"A: That's not true."

"Q: So you admitted to investigator Cole that you killed your brother. Correct?

"A: Yes.

"Q: Okay. And so you would have had to have raised the gun, looked down the sights, and pulled the trigger in the direction of your brother. Isn't that true?

"A: I don't know.

"Q: And during that time, right before you pulled the trigger, you said to yourself, I'm going to kill my brother. Isn't that right?

"A: No."

"Q: Well, you already testified that you shot him six times. True?

"A: Yes.

"Q: So you knew you would have had to pull the trigger a second time. Correct?

"A: Assuming so, yes."

"Q: Right before you shot him that second time, you told yourself, I'm going to kill my brother, didn't you?

"A: No, I did not."

"Q: And right before shooting him, you thought about it, [be]cause there was a pause in the shooting, wasn't there?

"A: I don't know.

"Q: And—and you thought to yourself, should I finish him off? Didn't you?

"A: No, I didn't.

"Q: And then at that point, you made a decision in your mind that you were, in fact, going to shoot him—finish him off, and you shot him a fourth time. Correct?

"A: That's not what was going on in my mind, no."

"Q: Did you love your brother?

"A: Yes, I did."

"Q: Did you love him when you fired those first three rounds in his back, he fell down to the ground, you thought about it again and put three more into his shoulder and chest? Did you love him then?

"A: I love my brother."

B. *Haynes's Contention*

Haynes contends these questions constitute prosecutorial misconduct because there were "not questions by the prosecutor but . . . speeches masquerading as questions . . . ."

C. *Forfeiture*

To preserve a claim of prosecutorial misconduct, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper conduct. (*People v. Linton* (2013) 56 Cal.4th 1146, 1205 (*Linton*).) Haynes's trial attorney did not object to any of these allegedly improper questions. Nothing in the record suggests an objection would have been futile, or an admonition inadequate to cure any harm. Accordingly, these claims are forfeited.

D. *Ineffective Assistance of Counsel*

Recognizing this, Haynes contends his trial counsel provided ineffective assistance by failing to object. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial. (*People v. Brown* (2014) 59 Cal.4th 86, 109.) If the prosecutor's questions were not improper, then counsel did not provide ineffective assistance by failing to object. (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90 [failure to make a meritless objection is not ineffective assistance].)

The questions Haynes challenges were not improper. "When a defendant chooses to testify concerning the charged crimes, the prosecutor can probe the testimony in detail

and the scope of cross-examination is very broad." (*People v. Dykes* (2009) 46 Cal.4th 731, 764.) Moreover, "[w]hen a defendant voluntarily testifies, the district attorney may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them. [Citation]. A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies." (*People v. Cooper* (1991) 53 Cal.3d 771, 822.)

The prosecutor did not commit misconduct in questioning Haynes about his state of mind. Whether Haynes deliberated and premeditated was a central issue in the case, and by electing to testify, Haynes made himself a key witness on that issue. The questions Haynes challenges were designed to elicit evidence impeaching and contradicting Haynes's testimony that he "black[ed] out" and did not "know what [he was] doing" and was not "in [his] right mind."

Argumentative questioning is "a tactic of posing queries that are not actually addressed to the witness, to which answers are not really expected, and that may in fact be unanswerable, as a device to insinuate facts not in evidence, or to make a speech to the jury." (*People v. Shazier* (2014) 60 Cal.4th 109, 141-142.) The questions here were not argumentative. They were answerable, most of them by a simple yes or no answer.

Disagreeing with this result, and citing *People v. Mayfield* (1997) 14 Cal.4th 668, Haynes contends "it was misconduct for the prosecutor to repeatedly ask [Haynes] questions that the prosecutor knew [Haynes] would deny."[8] However, the issue in *Mayfield* was whether the prosecutor committed misconduct "by asking questions that insinuated facts that the prosecutor knew the defendant would deny, *even though the prosecutor had no intention of proving those facts by other means*." (*Id.* at p. 753, italics added.) In sharp contrast here, the challenged questions did not imply the existence of any facts (or reasonable inferences therefrom) not already in evidence.

E. *Asking Haynes If He Was Lying*

Haynes also contends the prosecutor committed misconduct by asking him if he was lying or a liar:

"Q: Steven, you'd agree with me if I said you're a liar, right?

"A: No.

"Q: You're not being completely truthful with this jury, are you?

"A: Yes, I am."

Citing *People v. Chatman* (2006) 38 Cal.4th 344 (*Chatman*), Haynes contends these questions are improper because they "served no other purpose than to improperly suggest [Haynes] was trying to deceive the jury." Again, however, Haynes has forfeited this issue because trial counsel did not object. (*Linton*, *supra*, 56 Cal.4th at p. 1205.) In any event, the argument is without merit.

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8 *People v. Mayfield* was overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391.

In *Chatman, supra,* 38 Cal.4th 344, the California Supreme Court explained: "[C]ourts should carefully scrutinize 'were they lying' questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (*Id.* at p. 384.)

By choosing to testify, Haynes put his own veracity at issue. The prosecutor's question allowed Haynes to explain why his testimony should be believed. The jury properly could consider any such reason Haynes provided, and, if he had no explanation, the jury could consider that fact in determining whether to credit his testimony or the conflicting testimony of other witnesses.[9] Thus, the prosecutor's questions were proper because they "sought to elicit testimony that would properly assist the trier of fact in ascertaining whom to believe." (*Chatman, supra,* 38 Cal.4th at p. 383.)

Haynes asserts that a prosecutor's insinuation that the defendant is fabricating a defense is misconduct when there is no evidence to support such a claim. (See *People v. Earp* (1999) 20 Cal.4th 826, 862-863.) However, the prosecutor's questions here were based on inconsistencies in statements Haynes gave to police—initially denying that he shot his brother and later admitting that he did so. No misconduct occurred because the prosecutor had an evidentiary basis for asking the question.

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9 For example, Rick testified (and Haynes denied) that before going back outside, Haynes said he intended to shoot Michael and was pacing back and forth.

Additionally, the precise issue in *Chatman*, *supra*, 38 Cal.4th 344 was whether it is misconduct to ask a witness to comment on the veracity of *other* witnesses. (*Id.* at p. 379.) The policy concerns identified in *Chatman* regarding asking one witness to comment on the veracity of another witness's testimony do not arise when, as here, the witness is asked to comment on his or her *own* credibility. Certainly, a witness is competent to render an opinion on his or her own veracity, and the witness's answer to the question "[a]re you lying?" would be relevant to the jury's assessment of the witness's credibility. (Cf. *United States v. Freitag* (7th Cir. 2000) 230 F.3d 1019, 1024 ["[W]e are not troubled by the prosecutor asking a witness to remark on the truthfulness of her own testimony because the witness's reaction and response are proper fodder for the jury's credibility determinations."].)

Haynes also contends the prosecutor committed misconduct by asking him, "So, you're a liar. You would agree with that?" However, the court sustained defense counsel's objection to that question. Thus, even if this question was misconduct, Haynes cannot demonstrate he was prejudiced by a question to which an objection was sustained. (*People v. Pinholster* (1992) 1 Cal.4th 865, 943, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

F. *Referring to the Killing As Murder*

Jessica testified that while sitting on the porch step, she "felt the velocity of about five or six shots." She then testified, "I didn't think this was a murder that I was witnessing at the time." Haynes's attorney objected to her using the word "murder." The court admonished the jury and the witness: "[L]adies and gentlemen, whether it's a

murder or not is a legal question that you're going to have to decide. So if you just want to refer to . . . the shooting or . . . the killing. The killing is fair."

Haynes contends that on two occasions thereafter, the prosecutor committed misconduct by referring to the killing as "murder." Specifically, the prosecutor asked Haynes, "So your concern wasn't, again, about your brother, but the fact that your friends had ratted you out for this murder." Defense counsel objected. The court responded, "If you want to change the question about this killing. At this point in time, it's going to be for the jury to decide what the nature of the homicide is, so I think it is argumentative." The prosecutor rephrased the question as the court suggested. Later, the prosecutor said "murder" again, asking Haynes, "And then you have—you have the gun with you, the murder weapon, and you release the cylinder." Again Haynes's attorney objected, which the court sustained. The prosecutor rephrased the question, "You have this gun with you and you release the cylinder, and you get rid of the shell casings. Correct?"

As the Attorney General concedes, it is "improper for a prosecutor to use the term 'murder' in questioning a witness about an unadjudicated killing." (*People v. Price* (1991) 1 Cal.4th 324, 480 (*Price*), superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.) However, "'[a] defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" (*People v. Tully* (2012) 54 Cal.4th 952, 1010.) Although we do not condone the prosecutor's improper questions, the isolated references to "murder" in these questions was not prejudicial. Parts of the record Haynes does not cite show the

prosecutor heeded the court's admonishment and on nine occasions referred to the shooting as a killing, not a murder.[10] In sustaining defense objections, the court admonished the jury that "whether it's a murder or not is a legal question that you're going to have to decide" and "it's going to be for the jury to decide what the nature of the homicide is." The admonishment made the jury acutely aware of the distinction between "murder" and "killing," and that determining whether Haynes was guilty of murder or a lesser included offense was its central task. (See *People v. Garbutt* (1925) 197 Cal. 200, 208-209 [prosecutor's use of the term "murder" not prejudicial in light of the court's admonishment].)

Additionally, the court instructed the jury with CALCRIM No. 222, which states that jurors are to not assume the truth of any insinuation suggested by an attorney's question.[11] Jurors are presumed to understand and to comply with instructions. (*People*

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10 "You—on that weekend you learned, obviously, that Michael had been *killed*. Correct?" "And after Michael was *killed*, did you continue to talk to Stephanie?" "You told Investigator Cole and Investigator Peters after you finally admitted to—to *killing* your brother, there was no excuse for you to shoot him. Isn't that true?" "And Michael was 28 when you *killed* him?" "Starting from the day you *killed* your brother, how many years back?" "And you had seen [Jessica] at the house now and again in the week prior to you *killing* your brother. Correct?" "So you admitted to Investigator Cole that you *killed* your brother. Correct?" "When you drove off after you *killed* your brother, you didn't get into any accidents. Correct?" "As part of that interview, did he at some point admit to *killing* his brother?" (Italics added to all preceding quotes.)

11 CALCRIM No. 222 states in part: "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true."

v. Homick (2012) 55 Cal.4th 816, 867.) Moreover, during closing argument, defense counsel emphasized that it was for the jury to determine that Haynes was guilty of voluntary manslaughter, not murder: "He lost it and he went and got the gun, and we know what happened then. This is heat of passion manslaughter, and that is a reasonable interpretation of the facts. And in light of that, you must find him not guilty of first-degree murder and not guilty of second-degree murder, but guilty of manslaughter."

It is not reasonably probable that the jury's decision—which required four days of deliberations—was influenced by the prosecutor's two references to murder rather than killing. (See *Price*, *supra*, 1 Cal.4th at p. 480 [reference to "murder" harmless].)

G. *Improper Character Evidence*

In 2006 Haynes was convicted of felony assault with a deadly weapon. Before trial, the court ruled that Haynes could be impeached with the prior conviction if he testified. On direct examination, Haynes admitted that prior felony conviction.

On cross-examination, the prosecutor used the prior conviction for another purpose—to show that as a convicted felon, Haynes was prohibited from possessing a gun:

"Q: [W]hy do you have a weapon?

"A: I don't know. Protection.

"Q: But you're a convicted felon, aren't you?

"A: No, I wasn't.

"Q: You're a convicted felon—

"[Defense counsel]: Objection.

"Q: –aren't you?

"The Court: Overruled.

"A: No.

"Q: You're not a convicted felon?

"A: I got that case dropped.

"Q: But you're aware that even though you got the case dropped, you still can't have a firearm?

"[Defense counsel]: Objection.

"The Court: Overruled.

"A: I wasn't aware of that.

"Q: Your attorney never counseled you on that? Is that what you're saying?

"A: No.

"Q: You received an order of dismissal filed on . . . September 21, 2012. Correct?

"A: I believe so. [¶] . . .

"Q: And according to this document, you represented yourself during this dismissal. Correct?

"A: I believe so. [¶] . . .

"Q: In fact this . . . [o]rder of [d]ismissal states . . . : [¶] 'This dismissal does not permit a person to own, possess, or have in his or her control a firearm,' doesn't it?

"A: I wasn't aware of that.

"Q: But you represented yourself, though. True?

"A: I didn't—I didn't do that. That was done for me.

"The Court: The document says that, though. Correct?

"A: I believe so. I don't know. I don't remember.

"The Court: Well, here. Look at it again and see if that's what the document says. Is that what it says? [¶] . . .

"A: Yes."

Haynes contends these questions elicited inadmissible character evidence—i.e., that Haynes committed the uncharged crime of being a felon in possession of a firearm—and the prosecutor committed misconduct in asking them.

""Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. [Citation]. Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent."" (*People v. Thomas* (2011) 52 Cal.4th 336, 354.)

Haynes is correct that this evidence was inadmissible. The only apparent purpose of informing the jury that Haynes was prohibited from possessing a firearm was to suggest he was the type of person to violate the law, and thus more likely to commit the charged offense. The identity of the perpetrator was not at issue. Nor was there any

common design or plan at issue. Although Haynes's state of mind was a key issue in this case, the Attorney General fails to explain how being a felon-in-possession is relevant to that issue, and we discern none.

In attempting to support admissibility, the Attorney General contends the evidence was relevant because Haynes presented witnesses who testified he was "peaceful", and his unlawful possession of a firearm rebutted that evidence. It is true that when in a criminal case a defendant presents testimony of his good character, the prosecution may impeach the testimony or rebut it with evidence of his bad character. (Evid. Code, § 1102, subd. (b).) However, the Attorney General's argument fails because such evidence is generally limited to opinion or reputation evidence and does not extend to evidence of the defendant's specific acts, such as a prior conviction or the facts underlying that conviction. (*People v. Hall* (2018) 23 Cal.App.5th 576, 592.)

"'Erroneous admission of other crimes evidence is prejudicial if it appears reasonably probable that, absent the error, a result more favorable to the defendant would have been reached.'" (*People v. Willliams* (2017) 7 Cal.App.5th 644, 678.) We apply a similar standard of prejudice when considering a claim of prosecutorial misconduct. (*People v. Peoples* (2016) 62 Cal.4th 718, 798-799, 804.) Haynes argues the evidence was prejudicial because in closing argument, the prosecutor twice told the jury that Haynes retrieved a gun "he wasn't supposed to have." We agree that the prosecutor's argument increased the potential for prejudice; however, the inadmissible evidence told the jury nothing it did not know from other properly admitted evidence in this case—i.e., Haynes had suffered a prior felony conviction (which the jury could consider in assessing

his credibility) and owned a handgun. Moreover, the court significantly mitigated any potential for prejudice by instructing the jury with CALCRIM No. 316, which informed the jury it could use the other-crime evidence *only* on the issue of credibility:

> "If you find that a witness has committed a crime or other misconduct, you may consider that fact only in evaluating the credibility of the witness's testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable."

Further, the case did not turn on whether Haynes lawfully or unlawfully possessed the gun. It turned on his state of mind in firing it, and the prior conviction had nothing to do with that issue. The reference to Haynes's unlawful possession was brief and is contained in a transcript containing much more compelling evidence of his guilt. On this record, the error was harmless.

H. *Misstatements of Law in Closing Argument*

1. *Premeditation and deliberation*

In closing argument, the prosecutor summarized the evidence showing deliberation and premeditation: Haynes went inside to get the gun, loaded it, told Rick his intentions, paced back and forth, shot Michael twice, went back inside, and then came out and shot Michael four more times. The prosecutor argued that Haynes "made the conscious decision to kill his brother" when he went into the house to get his gun. He argued that "each step of the way," Haynes deliberated about killing. The prosecutor told the jury that Haynes had already made his decision to kill when he saw Michael "standing in the grass, completely unarmed." He argued that after shooting Michael three times,

Haynes "again deliberates . . . should he finish him off?" and decided again to kill. The prosecutor argued that Haynes "wanted retaliation for what his brother had done. . . . [¶] . . . [¶] [I]t was never about [Michael] being a threat. It was about exacting revenge, a motive for murder."

Focusing on premeditation and deliberation, the prosecutor additionally argued, "Things that you need to realize about premeditation, deliberation, and willfulness. It's not a test of time. A decision can be made—can be reached quickly. It's the extent of the reflection that counts. To reach a decision to kill can be made quickly." The prosecutor argued that Haynes's postarrest statement—"'[W]hat am I going to do if I leave?'"—showed deliberation. He argued that "you could take all of that away and you would still have deliberation" because while Michael was on the ground dying Haynes "deliberates in his mind again [be]cause there's a pause. And he deliberates in his mind whether or not he should finish him off. He states, 'I stood over him and I shot him. I shot him twice and then he fell, and I stood over him and I shot him again.' [¶] During that time—*remember, deliberation can be done in an instant.* During that pause, that's—that's him finishing . . . his brother off. That's that deliberation." (Italics added.)

Concluding his argument on this topic, the prosecutor stated, "And lastly, premeditation that he considers beforehand, before doing the actual act. When the defendant walked through those doors as I just stated to you, the decision was made to kill his brother. And *within a minute* before he actually killed his brother, that decision was made. [¶] A lot of times people think that when you're talking about premeditation, deliberation, willfulness, you know, you're up the night before and you got this big map

and your scheming and you're lying in wait. But no. The law doesn't require that. *Premeditation and deliberation can be done in an instant.* And this time we have more than a minute or two of him doing that. So that element[] [has been] proved beyond a reasonable doubt." (Italics added.)

Haynes contends that in telling the jury that premeditation and deliberation can occur "in an instant," the prosecutor committed misconduct by misstating the law.

It is improper for the prosecutor to misstate the law in closing argument. (*People v. Cortez* (2016) 63 Cal.4th 101, 130.) "Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citation.] Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*Ibid*.) To establish misconduct, Haynes need not show that the prosecutor acted in bad faith. (*Ibid*.) However, he does need to "'show that, "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner."'" (*Ibid*.)

To preserve a claim of prosecutorial misconduct, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. (*Linton*, *supra*, 56 Cal.4th at p. 1205.) Haynes's trial lawyer did not object to the comments appellate counsel asserts were improper. Nothing suggests an

objection would have been futile or an admonition inadequate to cure any harm. Accordingly, these claims are forfeited.

Recognizing this, Haynes contends his counsel provided ineffective assistance by failing to object. To resolve of that issue, we address the merits.

The prosecutor did not misstate the law in telling the jury that premeditation and deliberation can occur "in an instant." In context, it is apparent that the prosecutor was using that term hyperbolically to mean in a relatively short time period. This is consistent with CALCRIM No. 521, which instructed that "a cold, calculated decision to kill can be reached quickly." In *People v. Williams* (1997) 16 Cal.4th 153, the court held that a prosecutor did not misstate the law when he told the jury that deliberation can occur in "a split second." (*Id.* at pp. 223-224.) The prosecutor's use of the phrase "in an instant" here similarly connotes a short time period. Moreover, elsewhere in closing, the prosecutor explained that Haynes deliberated from the moment he entered the house to when he pulled the trigger. Consistent with Jessica's testimony that about a minute elapsed between the time Haynes went into the house and the gunshots, the prosecutor argued, "And within a minute before he actually killed his brother, that decision [to kill] was made." Accordingly, Haynes's trial attorney was not ineffective in failing to object because the prosecutor did not misstate the law.

2. *Deliberation after Michael was already dead*

In a related argument, Haynes contends the prosecutor misstated the law by arguing the jury could find that Haynes premeditated in the few seconds between the first and second volley of gunfire. Haynes contends this was misconduct because "the

evidence established that one of the initial shots fired was likely fatal" and as a matter of law premeditation and deliberation must occur before the killing.

Haynes's argument is untenable because Michael was still alive for at least a few moments, even *after* the sixth and final shot. Jessica testified that she gave Michael CPR and saw him take "his last breath." After the shooting, Rick attempted to revive Michael, who was "spitting blood" and "gasping for air."

3. *Provocation*

In closing argument, the prosecutor also explained that the jury should not find voluntary manslaughter. He said, "Heat of passion is witnessing something so provocative that you have such violent emotion that causes a person *to act immediately* and without deliberation and reflection." (Italics added.) He offered "classic examples" of provocation such as a mother opening a door and seeing her child being molested, or a spouse opening a bedroom door and seeing their spouse "cheating on them with another person." The prosecutor contrasted those examples with evidence that Haynes "didn't just react. He went to different places in the house. He got a weapon. He loaded a weapon. He talked to another person. Then he came down. And that requires thinking. And thinking is not heat of passion." The prosecutor argued that two brothers fighting was not sufficient provocation. He acknowledged that the defense would argue that Haynes was provoked by not just the fight, but years of abuse. He told the jury that such evidence was "character assassination" and was "not credible." He said the defense was confusing self-defense with heat of passion.

On appeal, Haynes contends the prosecutor misstated the law by stating that sufficient provocation "can only be induced by 'witnessing' a provocative event that causes a defendant to act 'immediately.'" However, viewing the entire argument in context, we do not interpret it so narrowly. The prosecutor urged the jury to reject heat of passion because "based on the defendant's conduct . . . he didn't just react." This was a correct statement of law and, to the extent the prosecutor's statement about witnessing provocative conduct might have been unclear, this focused the jury on the relevant issue.

Haynes also contends that by arguing that heat of passion requires "a person to act *immediately* and without deliberation and reflection" (italics added), the prosecutor misstated the law because provocation may encompass events that occur over time. (Italics added.) In a related argument, Haynes contends that by telling the jury to ignore Michael's history of violence, the prosecutor improperly implied that adequate provocation has no subjective component.

However, the court instructed the jury with CALCRIM No. 570, which states in part: "In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and *immediate influence* of provocation." (Italics added.) When viewed in context of the entire closing argument, the prosecutor's use of the word "immediately" is consistent with this instruction.

Moreover, the prosecutor's argument did not eliminate the subjective component of heat of passion. Rather, the thrust of the argument was the jury should reject that theory as being unsupported by the evidence. For example, in cross-examination Haynes conceded that he fought back in some of the brothers' fights, including the July 2012

beating when Michael damaged Haynes's earlobes. Haynes also admitted that for the most part he got along with Michael. On direct examination, Haynes testified that Michael beat him up when they were in high school; however, on cross Haynes admitted that he told the police, "Mike didn't beat me up in high school." On cross, Haynes also admitted telling police that Michael had beat him up "[w]hen we were kids, *but nothing recently*." (Italics added.) Moreover, although there was evidence that Michael had been violent toward his former girlfriends and stepfather, the prosecutor argued that had nothing to do with whether *Haynes* was adequately provoked on September 15th. Reasonably construed in the context of the entire closing argument, the prosecutor's assertions that Michael's history of violence "has nothing to do with the elements of heat of passion" is simply an advocate's view of the evidence, perhaps an exaggeration or hyperbole—but not a misstatement of law.

Citing *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*), Haynes also argues that the prosecutor misstated the law by telling the jury that a "classic" example of heat of passion is a mother seeing her child being molested. He contends this "overstated the provocation requirement," suggesting that circumstances making a homicide lawful (justified) are necessary to inflame a reasonable person.

In *Najera*, *supra*, 138 Cal.App.4th 212, the prosecutor explained heat-of-passion with this example: "'You think there's an intruder in the house. Your son or daughter is yelling for help. You grab that gun and go into that bedroom of your son or your daughter, and lo and behold, what do you see? You see somebody molesting your child, God forbid. And what do you do? You pull out your gun and you shoot that person

who's molesting your child. [¶] That is a voluntary manslaughter.'" (*Id.* at p. 221.) The court found this misstated the law by suggesting that circumstances justifying homicide are necessary to inflame a reasonable person. (*Id.* at p. 222.)

The Attorney General contends *Najera, supra,* 138 Cal.App.4th 212 is distinguishable because here the prosecutor "merely stated that a mother came home to find her child being molested" and did not include the additional hypothetical facts that there was an intruder in the house and the child was yelling. However, common to both hypotheticals is that a mother sees her child being molested. That is the key point—a parent sees a dangerous felony being committed against her child and responds with deadly force. Accordingly, while the prosecutor's hypothetical here lacks some details of the one in *Najera,* it suffers from the same fundamental problem—it erroneously suggests that circumstances making a homicide *lawful* (defense of others) are necessary to constitute adequate provocation.

However, Haynes's trial counsel did not object and, therefore, to avoid forfeiture, Haynes must establish his trial attorney rendered constitutionally ineffective representation by not doing so. "'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citation.] '[W]e accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.'" (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.) If the record on appeal sheds no light on why

trial counsel acted or failed to act in the manner challenged, an ineffective assistance claim must be rejected unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1058.)

Here, it appears that defense counsel chose to address the defects in the prosecutor's closing argument in his own closing. Defense counsel told the jury this was not a case of self-defense—"You do not need to consider that, whether perfect or imperfect." He told the jury that provocation has no time limit, stating, "It can be ten years before the shooting." Defense counsel argued that Michael's pattern of violence, "a pattern of what [Haynes] thinks and knows he is capable of" constituted adequate provocation for manslaughter. Counsel emphasized that in applying the reasonable person standard, the jury had to consider "the collective experience of what [Haynes] has endured." He argued, "It's not a short period of time right as he's being head-butted. It's a lifetime of mistreatment and being victimized."

Such a choice was a reasonable tactical decision. It is a common strategy to allow opposing counsel's argument to proceed uninterrupted, perhaps to avoid antagonizing the jury, and then to address objectionable matters in responding argument. Defense counsel's performance was not deficient in failing to object to the prosecutor's erroneous example of adequate provocation.

Moreover, it is not reasonably probable that the result would have been more favorable to Haynes if his counsel had objected to the prosecutor's closing argument. Such an objection presumably would have resulted in a correction and admonition from

the court and an amended argument from the prosecutor. However, the prosecutor essentially gave an amended final argument on this issue. After telling the jury that a "classic" example of provocation would be a mother seeing her child being molested, the prosecutor further explained that the applicable standard was whether "a person of average disposition" would "act rashly and without due deliberation."
The prosecutor told the jury, "It's for you to determine the sufficiency of provocation in this case."

Additionally, the court instructed the jury with CALCRIM No. 570 on voluntary manslaughter, heat of passion. The court also gave CALCRIM No. 200, which states in part: "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We presume the jury was capable of understanding the court's instruction and followed it rather than counsel's misstatement of law. (See *People v.* Gonzales (2011) 51 Cal.4th 894, 940.) Accordingly, there is no reason to conclude the jury based its verdict on the prosecutor's improper example of heat of passion. We therefore reject Haynes's claim of ineffective assistance of counsel.

4. *Burden of proof*

"If the issue of provocation . . . is . . . 'properly presented' in a murder case [citation], the People must prove beyond a reasonable doubt that these circumstances were lacking in order to establish the murder element of malice." (*Rios, supra,* 23 Cal.4th at p. 462, italics omitted.) Otherwise, the defendant cannot be convicted of murder. (*Id.* at p. 461.) In other words, heat of passion is not an element of voluntary manslaughter that the People must prove beyond a reasonable doubt to obtain a

conviction for that offense. Instead, the People must prove its absence in order to obtain a conviction for murder. (See *People v. Franklin* (2018) 21 Cal.App.5th 881, 889 (*Franklin*).)

In closing argument, the prosecutor addressed voluntary manslaughter, stating, "Now, you heard that there was a lesser included offense in this case. In this case, voluntary manslaughter by heat of passion. . . . And you're going to see that there's three elements for it. *And none of the elements can be proved beyond a reasonable doubt. But all three elements would have to be met in order for us to get to voluntary manslaughter. I've already proved first-degree murder. So all three elements of heat of passion would have to be met*." (Italics added.) The prosecutor then discussed some of the evidence and after explaining why there was no adequate provocation in this case said, "So the elements, again, all have to be met." Asserting that Michael's history of violence was not adequate provocation, the prosecutor argued, "[T]hose set of facts are all not credible. They are all flawed. *They are not proved beyond a reasonable doubt*." (Italics added.) After discussing the objective component of heat-of-passion, the prosecutor told the jury, "And that's why there's no heat of passion in this case. None of the elements are met."

Apparently realizing these statements are problematical, in rebuttal argument the prosecutor argued: "There are three elements for heat of passion. And these elements I

have to prove to you that they did not happen, at least one of them, those elements are not met."[12]

Haynes contends the prosecutor misstated the law by implying that the defense bore the burden of proving each "element" of voluntary manslaughter beyond a reasonable doubt." However, defense counsel did not object. Accordingly, we consider the issue in the context of Haynes's contention that his attorney rendered ineffective assistance by failing to do so.

"[W]hen considering a claim of ineffective assistance of counsel, 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) To demonstrate prejudice, Haynes must show there is a reasonable likelihood he would have obtained a more favorable result than his conviction for first degree murder had his attorney objected and requested a curative admonition. (*Najera, supra,* 138 Cal.App.4th at pp. 224-225.)

Recently, in *Franklin*, *supra*, 21 Cal.App.5th 881, this court considered a similar situation. There, the jury convicted the defendant of attempted first degree murder. In the trial court, he claimed his conviction should be reduced to attempted voluntary manslaughter or, alternatively, the finding of premeditation and deliberation should be

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12 Haynes contends even this attempted correction misstates the law; however, because we determine any error was harmless, it is unnecessary to resolve that point.

vacated. (*Id.* at p. 886.) After the trial court denied that motion, he appealed, asserting among other things that his conviction should be reversed for instructional error that essentially burdened *him* with proving adequate provocation beyond a reasonable doubt. (*Id.* at p. 889.) Although we concluded the jury instruction was erroneous, we affirmed because there was no prejudice. There was no prejudice because the jury was properly instructed regarding premeditation, deliberation, and willfulness, and found that Franklin's act was indeed premeditated, deliberate, and willful. (*Id.* at p. 892.) We concluded this finding means the jury necessarily decided that the defendant was not acting in the heat of passion, and so was not prejudiced by any instructional error, because premeditation and deliberation is manifestly inconsistent with having acted under the heat of passion. (*Id.* at pp. 892-894.)[13]

Similarly here, assuming without deciding that the prosecutor misstated the law by telling the jury that Haynes had the burden of proving sufficient provocation, Haynes was not prejudiced. The court instructed the jury that it could not find premeditation and deliberation unless the People proved beyond a reasonable doubt that Haynes "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." (CALCRIM No. 521.) The court also instructed that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." The prosecutor's erroneous statement of law was explicitly limited to voluntary manslaughter and, therefore, did not affect these instructions on first degree

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13 Because *Franklin*, *supra*, 21 Cal.App.5th 881 was decided after briefing was completed, we requested and have reviewed supplemental briefs on this issue.

murder. (See *Franklin, supra,* 21 Cal.App.5th at p. 894.) Accordingly, the jury's determination that Haynes carefully weighed his choice to act and did not decide rashly or impulsively could not possibly coexist with heat of passion, which "'arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinary reasonable person of average disposition to act *rashly and without deliberation* and reflection, and from such passion rather than from judgment."'" (*Franklin, supra,* 21 Cal.App.5th at p. 894.) Therefore, the jury's finding of premeditation and deliberation "nullifies any potential for prejudice here." (*Ibid.*)

Haynes also contends the prosecutor further obscured the law when he told the jury that it had to "start off with first-degree murder" and "the only way" it could get to a "lesser" was if it found Haynes not guilty of first degree murder, and then, likewise, second degree murder. Citing *People v. Kurtzman* (1988) 46 Cal.3d 322, Haynes contends a jury should not be prohibited from considering or discussing the lesser offenses before returning a verdict on the greater offense. Haynes's argument fails, however, because the prosecutor did not tell the jury it could not discuss the lesser offenses first. In a portion of the closing argument Haynes ignores, the prosecutor stated, "You can discuss them in any order you want to."

I. *No Cumulative Prejudicial Effect*

Haynes contends the errors, when considered cumulatively, denied him due process. However, for the reasons we have explained, whether considered individually or for their cumulative effect, the errors did not affect the trial process, deprive Haynes of

his constitutional rights, or otherwise accrue to his detriment. (See *People v. Sanders* (1995) 11 Cal.4th 475, 565 [errors were few in number and of minimal significance, no cumulative error]; *People v. Cudjo* (1993) 6 Cal.4th 585, 637 [the few errors were inconsequential; no cumulative error].)

III. *RESENTENCING*

A. *Firearm Ehancement*

Section 12022.53, subdivision (a)(1) and (d) provides that any person who, in committing murder personally and intentionally discharges a firearm and proximately causes great bodily injury or death shall be punished an additional and consecutive term of imprisonment for 25 years to life. Here, the court imposed this enhancement, adding 25 years to life years to Haynes's indeterminate term.

When sentencing Haynes in 2016, the court could not strike this enhancement. (§ 12022.53, former subd. (h), added by Stats. 2010, ch. 711, § 5, repealed by Stats 2017, ch. 682, § 2, eff. Jan 1, 2018.) However, effective January 1, 2018, section 12022.53, subdivision (h) provides: "The court may, in the interest of justice pursuant to [s]ection 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Haynes's case was not yet final when this amendment to section 12022.53 became effective. Accordingly, because section 12022.53, subdivision (h) now gives the trial court authority to lower Haynes's sentence, the Attorney General concedes, and we agree, that the matter should be remanded to the trial court to exercise its discretion in

determining whether to strike the firearm enhancement. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507.)

B. *Prior Serious Felony Enhancement*

Effective January 1, 2019, Senate Bill No. 1393 amends sections 667 and 1385 to give the trial court discretion to dismiss, in the interest of justice, five-year prior serious felony enhancements under section 667, subdivision (a)(1). (*People v. Garcia* (2018) 28 Cal.App.5th 961 (*Garcia*).) Under the versions of those statutes applicable when the court sentenced Haynes, the court had no such discretion, but instead was required to impose a five-year consecutive term for any person convicted of a serious felony who previously has been convicted of a serious felony. (*Ibid*.)

In *Garcia, supra*, 28 Cal.App.5th 961, Division Two of this District held "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill [No.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill [No.] 1393 becomes effective on January 1, 2019." (*Id.* at p. 973.) We agree with the analysis and conclusion in *Garcia* and, as noted *ante*, the Attorney General correctly concedes that Senate Bill No. 1393 applies retroactively to nonfinal cases.

Moreover, "'when the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.'" (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) A remand is not required, however, if "the record shows that the trial court clearly indicated when it originally

sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*Ibid*.; see also *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 (*Almanza*) [on rehearing, agreeing with *McDaniels*].)

Here, Haynes's prior conviction stems from 2006, when as a 19-year-old he pleaded guilty to assault with a deadly weapon after being arrested for driving a vehicle from which others were firing an airsoft gun (i.e., a gun that shoots plastic BBs). At the original sentencing hearing, the court granted Haynes's motion to strike this prior strike offense under *Romero*, noting that the 2006 conviction was remote in time and Haynes did not have an extensive criminal history. Additionally, addressing Haynes's family the court stated, "I want you to also understand that, by law, the scheme with regard to sentencing is devised by the State Legislature, and I have few options available to me. And I believe that the sentence imposed is lawful and mandated by law."

Accordingly, remand is required because the record does not contain any indication, much less a "clear indication," that the trial court would not have reduced the sentence if it had the discretion to do so. (*Almanza, supra*, 24 Cal.App.5th at p. 1110.)

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for resentencing to allow the trial court to exercise its discretion in determining whether or not to impose (1) the 25-year-to-life enhancement under section 12022.53, subdivision (d); and (2) the five-year enhancement under sections 667, subdivision (a)(1) and 1385, as amended effective January 1, 2019. We express no opinion here on how the trial court should exercise such discretion.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.